No. 96-6298

(9)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Supreme Court, U.S.
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AARON LINDH,

Petitioner

vs.

JAMES P. MURPHY,

Respondent

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded over 35 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring the correctness and fairness of criminal convictions. Among NACDL's objectives are to promote the proper administration of justice and to ensure that statutes are construed and applied in accordance with due process.

Letters from the parties to this case expressing their consent to the filing of this brief are on file with the clerk.

QUESTION PRESENTED

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in §107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases; and, if so, whether the court correctly interpreted this Court's retroactivity jurisprudence to depend upon proof of actual reliance interests and to create a presumption that habeas-curtailing statutes apply retroactively?

STATEMENT OF THE CASE

The petitioner, Aaron Lindh, is a state prisoner serving a life sentence. After his conviction in state court, he argued on appeal that his conviction had been obtained in violation of the Confrontation Clause of the Sixth Amendment. The state supreme court rejected that argument and affirmed the conviction in a decision reached in 1991.

In 1992, Mr. Lindh petitioned the United States District Court for the Eastern District of Wisconsin for a writ of habeas corpus. When that court denied relief, he appealed to the United States Court of Appeals for the Seventh Circuit.

On April 24, 1996, approximately two weeks after a circuit panel heard oral argument, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 into law. Pub. L. 104-132, 110 Stat. 1214 [hereinafter the Act]. The circuit court set the case for reargument en banc in order to consider the bearing one of the Act's amendments to Chapter 153 of the Judicial Code, §104(3), 110 Stat. 1219 (to be codified at 28 U.S.C. §2254(d), might have on Mr. Lindh's case.

Upon reargument, the circuit court decided that the Act fails to prescribe the cases to which §2254(d) applies and that, accordingly, that new section is applicable to this case unless its application would be retroactive. Finding no retroactive effects, the circuit court applied §2254(d) and on that basis denied relief, even though Mr. Lindh filed his petition well before the date on which the Act became law. Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996)(en banc).

Mr. Lindh sought review of that judgment, and this Court granted certiorari limited to the threshold question of §2254(d)'s applicability.

ARGUMENT

The question before the Court actually embraces two divisible questions, the one contingent upon the other. Initially, the Court must decide whether the circuit court erred in interpreting the Act to be silent regarding its own temporal reach. If the Court concludes that the Act reaches only cases initiated after its effective date, there will be no occasion for passing on to the second question--whether, if applied to this pending case, §2254(d) would have retroactive consequences within the meaning of Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994).

The petitioner, Mr. Lindh, challenges the circuit court's interpretation of the Act. He contends that the Act does address the applicability of its chapters on habeas corpus and that it clearly makes its amendments to preexisting habeas statutes (codified in Chapter 153 of the Judicial Code) inapplicable to cases pending at the time of enactment. Since §2254(d) is an amendment to Chapter 153, that new provision is inapplicable here.

We think the threshold statutory construction question is dispositive and therefore limit this amicus curiae brief to that issue. The circuit court was mistaken. The Act does prescribe its own temporal reach and, in explicit terms, disclaims the applicability of its amendments to Chapter 153, including §2254(d), to cases like this one.

Accordingly, the Court should reverse the judgment below on that basis alone and should remand with

instructions to consider Lindh's appeal without reference to §2254(d). Landgraf, 114 S.Ct. at 1496 (explaining that absent constitutional prohibition clear text governs a statute's applicability).

I. THE ACT MUST BE CONSTRUED ACCORDING TO ITS EXPLICIT TEXT RATHER THAN THE RHETORIC THAT ATTENDED ITS ENACTMENT

It is no secret that the 104th Congress was sharply divided along ideological lines. That fact of political life explains much about how and why the Act was passed, but very little about its actual content.

The vigorous polemics regarding the habeas corpus chapters of the Act certainly generated more heat than light. The debates in committee hearings and on the floor occurred at a level of generality well above the details of particular sections of pending bills. Typically, members of the House and Senate focused on the undifferentiated need for habeas corpus reform, on the notorious inefficiencies associated with habeas litigation, on the relative competence of federal and state courts, and on the virtues and vices of the death penalty.

The press, in turn, faithfully reported the aspects of the political process thought to be newsworthy. That typically meant the most colorful, quotable statements made by members attempting to exploit the process for political advantage. Newspaper and television accounts invariably featured theatrics that might entertain the public at large. Rarely did reporters delve into the more technical (and less accessible) details of the provisions under discussion.

The result is understandable. The Act is widely understood to enshrine a fiercely anti-habeas ideology. In the public mind, this new statute is neither more nor less than a collage of relentlessly repressive measures meant to bedevil habeas corpus petitions at every turn. The popular conception is that this must be so--because published reports of the process from which the Act emerged led the country to believe that it would be so.

In particular, the provision of the Act implicated here, §2254(d), already has the reputation of a general rule of "deference" to the state courts on the merits of constitutional claims. See Drinkard v. Johnson, 97 F.3d 751, 767 n.21 (5th Cir. 1996)(dismissing the suggestion that after such a long and vitriolic assault on habeas in the debates Congress could have enacted anything other than a radical bill). At least the lower court in this case has avoided that baseless characterization. See Lindh, 96 F.3d at 868 (noting that §2254(d) says nothing about "deference" to state court decisions regarding the meaning of constitutional rights).

Now, in any event, the klieg lights are off, the angry voices are silent, and only the enacted product remains. This Court's focus is not on what Congress might have done, nor on what some members would have done, nor, indeed, on what anyone thought was done. All that counts now is what actually was done--what Congress actually put in the statute books.

As this Court made clear in Landgraf itself, the national majoritarian democracy in the United States operates only when proponents of particular policies marshal majority votes in both houses of Congress, present their product to the President, and achieve, at the least, his acquiescence. Landgraf, 114 S.Ct. at 1496 (explaining that

"even the will of the majority does not become law unless it follows the path charted in Article I"); see INS v. Chadha, 462 U.S. 919 (1983)(invalidating one-House vetoes).

Legislators who propose (or oppose) public policies come to naught if they merely inject their views into committee reports and floor speeches, but lack the political muscle it takes to put hard language in the text of a statute.

Debating points and press releases may be many things good and fine; they may, indeed, be evidence of certain individuals' "intentions" with respect to legislative action. But they are not law. And it is only law that this Court can recognize and interpret--the law the Court finds on the printed page that emerges at the end of the legislative day. United States v. R.L.C., 112 S.Ct. 1329, 1339 (1992) (Scalia, J., concurring)(joined by Thomas J.); Musick, Peeler & Garrett v. Employees Ins., 113 S.Ct. 2085, 2096 (1993)(Thomas, J., dissenting) (joined by Blackmun & O'Connor, J.J.) (explaining that "[c]ourts should not treat legislative...silence as a tacit license to accomplish what Congress...[is] unable or unwilling to do").

Statutory construction demands attention not only to the dictionary definitions of isolated terms, but also to the overarching scheme in which terms are located. For the meaning of statutory language, "plain or not," depends on the context in which the language is used. King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991).

In this instance, the Court must look hard at the precise text of the Antiterrorism Act and respect that text as positive law. In so doing, the Court must take account of other statutory provisions governing federal collateral litigation--both provisions that have been added by the new Act and provisions that have been on the books for years and

were not disturbed by the new law. United States Savings Ass'n v. Timbers of Inwood Forest Ass'n, 484 U.S. 365, 371 (1988) (explaining that a statutory provision "that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme").

It is not just that preexisting provisions retain the authority they have always had. The 1996 Act constitutes a thoroughgoing appraisal of virtually every aspect of litigation in this field. In the context of such a comprehensive overhaul of the entire system, Congress has sometimes left longstanding provisions intact and has thus confirmed their role in the framework the 1996 legislation sets in place.

Even a complex legislative package like this one must be understood to be internally coherent. This Act, for all its intricate provisions, cannot and need not be read to generate irrational or unfair results that serve no discernible policy. On the contrary, this new legislation can be read, and is entitled to be read, to advance the public policies identified by its own explicit terms and structure--divorced from exploitive rhetoric and uncritical press accounts of political maneuvering.

When the Act is interpreted according to its precise text, the pragmatic results will look rather different from what the public has been led to expect. On examination, §2254(d) is not a warmed-over version of the oft-failed proposal to bar federal habeas relief if a prisoner's claim was "fully and fairly adjudicated" in state court. Nor is §2254(d) the initiative that was advanced in the House in the 104th Congress. By contrast, §2254(d) represents a compromise between different camps of habeas reformers--a compromise necessary to win passage of a general reform bill in 1996.

See Yackle, A Primer on the New Habeas Corpus Statute, 44 Buffalo L. Rev. 381, 422-43 (1996).

Just as the Court must consider the Act's explicit text when it construes specific substantive provisions in cases to which they apply, the Court must also attend to the Act's text with respect to the threshold question here--whether the Act prescribes a new provision's application in the first instance.

As Justice Thomas has explained, the Court cannot determine a statute's "coverage" by asking what Congress "'would have wanted to enact'" but must, instead, "look to the extant text of the statute and see what Congress has in fact, and not in theory, enacted." Morse v. Republican Party of Virginia, 116 S.Ct. 1186, 1234 n.18 (1996) (Thomas, J., dissenting) (joined by the Chief Justice and Kennedy & Scalia, J.J.).

II. THE ACT MAKES ITS AMENDMENTS TO CHAPTER 153 INAPPLICABLE TO CASES PENDING ON THE DATE OF ENACTMENT

As Mr. Lindh explains in the party brief, §107(c) of the Act explicitly addresses the applicability of its changes in habeas corpus law and makes only the new Chapter 154 applicable to pending cases. The Act thus speaks directly to the issue here and resolves it in Mr. Lindh's favor. On that basis alone, this Court should reverse.

The circuit court below mischaracterized Mr. Lindh's straightforward reading of the Act to depend on a negative implication. Far from it. Mr. Lindh simply reads §107(c) to draw a line between habeas provisions of the new Act that

will apply to pending cases (the provisions in Chapter 154) and habeas provisions that will apply only to future cases (the amendments to the preexisting provisions of Chapter 153).

The point of a provision like §107(c) is to identify a field of operation (here, the habeas corpus sections of the Act) and to classify items within that field into different categories according to some distinguishing characteristic or characteristics (here those provisions that apply to pending cases and those that do not).

When, accordingly, a rule like §107(c) draws a classifying line around a category, it necessarily and logically excludes what it does not include. To insist that such a rule addresses only what it affirmatively includes and is silent regarding what it excludes is to credit only half the rule's meaning. If statutory construction worked the way the circuit court suggests, federal legislation would have to be routinely repetitive. Every rule that defines a category and explains the matters that fall into that category would have to be followed by a redundant reminder that other matters do not.

That is not the way statutory construction works at all. By contrast, classifying rules are and must be read to operate in both directions--and thus to entail both what the definition of a category includes and, as well, what that definition necessarily excludes.

This particular provision, §107(c), no more operates by negative implication than any other provision in the Act. For example, §106 establishes the "gatekeeping" mechanism with which this Court dealt in Felker v. Turpin, 116 S.Ct. 2333 (1996). By its terms, that provision applies only to

cases in which prisoners wish to file second or successive habeas petitions. No one would say that it is inapplicable to cases in which prisoners file initial petitions merely by negative implication--in an attempt to disparage that obvious conclusion. Certainly, no one would propose on any such basis that the "gatekeeping" device might be read to control initial-petition cases--on the specious ground that the Act nowhere affirmatively disclaims that result.

Federal statutes cannot and need not compulsively spell out their range of application redundantly in their every provision. Rather, a complex enactment like the Antiterrorism Act sensibly addresses the "applicability" issue when and where clarity demands--when, this is to say, the Act sets forth a series of changes in habeas corpus law and then specifies, for purposes of those changes, precisely how the transition will proceed.

That is what the Act does in this instance. When the Act turns to its changes in the law of habeas corpus, it offers a single, clear statement of the adjustments that will apply to pending cases and, necessarily, the provisions that will not affect cases already under way.

The new Chapter 154 might have been thought to govern only future habeas petitions. As Mr. Lindh explains, that new chapter is triggered only if a state establishes a mechanism for supplying indigent death row prisoners with competent counsel for state collateral proceedings. Given the necessity of such a systemic change, it might have appeared that Chapter 154 would only be available in after-filed habeas actions. It was essential to clarity, then, that the Act specify that a state might previously have established a qualifying system that could trigger Chapter 154 in cases already in the pipeline.

The Act's amendments to Chapter 153, by contrast, would not be likely candidates for application to pending cases and, in the absence of a (surprising) provision to the contrary, it is perfectly clear that they are inapplicable to ongoing proceedings. For when the Act makes adjustments in preexisting provisions, it plainly acknowledges what has gone before and reconciles its additions in a way that minimizes disruption--that is, by creating a transition period during which pending cases can pass through the system unaffected.

The Act presupposes the basic habeas jurisdiction established by the 1867 Act, now codified in §2241 and reaffirmed in §2254(a), as well as the general habeas structural arrangements that have been developed over many years. Concomitantly, the Act recognizes habeas cases under way at the time of enactment and thus already being processed according to the existing provisions of Chapter 153.

The new law acknowledges the serious difficulties that would attend any change in the law governing those pending cases and, accordingly, explicitly isolates its changes in Chapter 153 (including §2254(d)) from the entirely new Chapter 154--the availability of which can be, and is, handled differently. Moreover, the Act recognizes the differences between prisoners already engaged in federal litigation under Chapter 153 and those who may be subject to the new Chapter 154. Prisoners in the latter category are necessarily on death row. They form the backlog of capital cases the Act plainly means to dislodge--as soon as possible and with the aid of the new provisions in Chapter 154 in states that qualify. Prisoners in the former category are typically serving prison terms and thus are not the prime

targets of the Antiterrorism and Effective Death Penalty Act at all.

The immediate application of Chapter 154 to death row prisoners in qualifying states may be justifiable on yet another ground. By hypothesis, prisoners whose cases are governed by Chapter 154 have had the benefit of competent lawyers in previous proceedings in state court and, in that way, have received some help in clearing the new hurdles that Chapter 154 establishes--e.g., tight filing deadlines.

By contrast, prisoners serving prison terms have not (necessarily) received any additional help in coping with litigation, and it is unfair to saddle them unilaterally with the new requirements established by the amendments to Chapter 153.

This is the way legislation enacted in the wake of Landgraf might have been expected to be framed. See Landgraf, 114 S.Ct. at 1498 (contemplating that Congress weighs the benefits of applying new legislation to pending cases against any disruption or unfairness that may result).

Indeed, the very point of Landgraf was to provide Congress with a sensible background rule on which to rely: "Congress [has] responsibility for fundamental policy judgments concerning the proper temporal reach of statutes" and (subject to constitutional restraints) can have its way simply by making its will known. Landgraf, 114 S.Ct. at 1501. With this background rule in place, it is untenable for the circuit court blithely to read the Act to be silent regarding a matter over which Congress has baseline authority to rule.

Of course, on this threshold question of applicability, the Act is not subject to any exaggerated "clear statement"

rule. Congress is obliged to employ especially exacting language only if it wishes to make new legislation retroactive in the Landgraf sense. Retroactive legislation is extraordinary, and it is for that reason that the Court's default position is that statutes will not be given retroactive effect in the absence of clear statement. Here, the only question is whether the Act prescribes the perfectly ordinary practice of introducing amendments to preexisting statutes only prospectively. It does.

This is not only what §107(c) says and what it means. It is also what makes sense. Making the Act's amendments to Chapter 153 prospective accomplishes two complementary ends. First, it avoids dislocations in cases already being processed under preexisting law and thus keeps the enactment of new reform legislation from perversely making habeas litigation more, not less, complex and time-consuming.

In this case, the parties dispute the nature and extent of the consequences that would follow from invoking §2254(d) so late in the day. Yet no one doubts that the application of that new provision here would have implications of a significant order. By specifying that §2254(d) is prospective only, the Act eliminates those difficulties in a single stroke--while nonetheless changing habeas corpus law in various respects for the future. The Act thus serves its policy goals (making federal habeas faster and more efficient) both in the near and in the long terms.

Second, making the amendments to Chapter 153 prospective also conserves resources. It relieves the federal courts of the duty and responsibility to determine whether the application of a provision like §2254(d) would have

retroactive effects--effects that would trigger the presumption against retroactive statutes.

Here again, the parties' arguments in this case are instructive. Enormous federal judicial effort has already been expended on the question whether invoking §2254(d) would attach new legal consequences to previous transactions in Mr. Lindh's case. Clearly, the resolution of that question demands careful, disciplined (and time-consuming) analysis. On reflection, none of that work was necessary. The Act does not require it, but explicitly disclaims it by making §2254(d) inapplicable here, irrespective of whether it would have retroactive effects if it were applied.

Just as the Act makes the inquiry into §2254(d)'s retroactive effects unnecessary, it makes similar investigations of the effects of other amendments to Chapter 153 equally unnecessary. But for the prospective-only character of all those provisions, they, too, would be subject to equally burdensome examination to determine any retroactive effects their application would entail.

Moreover, by the circuit court's account of the "retroactivity" inquiry, the demands on judicial resources would be multiplied many times over. The circuit court insists that the federal habeas courts must investigate the retroactive effects of amendments to Chapter 153 not only amendment-by-amendment, but also case-by-case. According to that court, the only effects that count as retroactive are those that upset reliance interests. That means, of course, that the history of each individual case would have to be investigated ad hoc in search of particularized instances in which prisoners relied on prior law to their detriment.

In the end, and certainly if the circuit court's approach were sustained in its entirety, "retroactivity" issues touching §2254(d) and various other amendments to Chapter 153 would command federal litigation well into the future, squandering scarce resources in the questionable pursuit of frustrated reliance interests peculiar to individual cases. And in this way, too, the Act's undisputed purpose to expedite and streamline federal collateral litigation would be frustrated.

Whenever new legislation is enacted, there is always a shakedown period during which new policies and procedures are assimilated into the system. That is obviously the case here, but, equally obviously, this transition season, too, will pass. The Act mitigates disruptions and conserves resources by giving its amendments to preexisting provisions of Chapter 153 prospective effect only.

This is the pragmatic framework contemplated by Landgraf, and it would be a serious mistake to let the noise surrounding the Act's adoption drown out the message contained in the Act's actual text.

CONCLUSION

For the reasons given above, the Court should reverse the circuit court's judgment and remand with instructions to consider Mr. Lindh's claim without regard to §2254(d). The Act expressly bars that provision's application to a case like this one, in which the petition for habeas relief was pending on the date of enactment. This conclusion is dispositive, and the Court need consider no other issue.

Respectfully submitted,

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